DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-212403.4 **DATE:** May 3, 1984

MATTER OF: Hollfelder Technische Dienste GmbH

DIGEST:

1. A protest against the affirmative responsibility determination (involving definitive criteria) of the contractor which was first raised in comments on the agency report and is based on information in the agency report is untimely under our Bid Protest Procedures when not received in our Office within 10 days after the agency report was received by the protester.

2. An item in an RFP which provides that a contract may not be awarded to an offeror which has not complied with all provisions does not make other provisions in the RFP definitive responsibility criteria.

3. Protest that award to offeror which does not intend to pay to its employees social benefits required by German law will constitute a violation of the Status of Forces Agreement with Germany involves contract administration which our Office will not review.

Hollfelder Technische Dienste GmbH (Hollfelder) protests award to Apex International Management Services, Inc. (Apex), of a contract under request for proposals (RFP) DAJA37-83-R-0437, issued by the United States Army Contracting Agency Europe for the operation and management of government-owned drycleaning plants in five different locations in the Federal Republic of Germany.

We dismiss the protest.

Hollfelder contends that Apex has failed to meet definitive criteria of responsibility, that award to Apex violates the Status of Forces Agreement (SOFA) and that an apparent misrepresentation by Apex of compliance with fringe benefit payments required by German law renders Apex nonresponsible as a matter of law.

The third basis of protest was raised for the first time in the comments of Hollfelder to the report of the

Department of the Army (Army). The comments of Hollfelder indicate that the information on which the protest was based was contained in the Army Memorandum of Law, a part of the agency report, which was received by the protester on or about January 4, 1984. The protest was not received in our Office until January 31, 1984. Section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1983), requires that a protest be received in our Office within 10 working days after the basis of the protest is known or should have been known. Since the protest on this basis was not received in our Office within 10 working days after January 4, 1984, it is untimely and will not be considered.

Hollfelder argues that the combination of paragraph L-23(c), amendment 0004, together with paragraph M-7, made payment of the fringe benefits by the offeror, required by German law, a definitive responsibility criterion. Hollfelder alleges that Apex has not paid and does not intend to pay the fringe benefits to its employees.

Paragraph L-23(c) of the RFP, as added by paragraph 1 of amendment 0004, provides that the average labor rates set forth for each contract location in paragraph L-23(b):

> ". . . are to be burdened (burden to be added) at the approximate rate of 27% which covers fringe benefits payable under the German labor law, such as social pay, social insurance, year-end and mid-year benefits, leave pay, sick pay, retirement, and other social benefits."

Paragraph M-7, under the section "Evaluation and Award Factors," provides:

> "M-7 ACCEPTABLE PROPOSALS
>
> "a. Award may not be made to any proposer who has not complied with all instructions, certifications, and representations contained in this solicitation. It is expected that compliance will be effected during preparation and submission of proposals.
>
> "b. Prospective Contractors must submit both a price proposal, Part I and a Management Proposal, Part II, covering the areas identified in Section L-26. The Management Proposal will be evaluated for the purpose of assisting the Contracting Officer in making a determination of responsibility."

Definitive responsibility criteria involve specific and objective special standards of responsibiliy, compliance with which is a necessary prerequisite to award that cannot be waived by the contracting officer, such as a specified number of years in the laundry and drycleaning business. See Freedom Industries, Inc., B-212371, November 28, 1983, 83-2 CPD 617. The offeror is required to furnish evidence of compliance before award. Power Testing, Incorporated, B-197190, July 28, 1980, 80-2 CPD 72; Preventive Health Programs, February 20, 1980, 80-1 CPD 144.

Paragraph M-7 of the RFP applies equally to all "instructions, certifications, and representations" in the RFP. Paragraph L-23(c) is a provision which merely warns offerors of the necessity of adding an "approximate" 27 percent to "average" labor rates to cover fringe benefits required by German law. Paragraph L-23(d) states that the provisions of L-23(a) through (c) are provided only for the purpose of aiding offerors in preparing proposals and warns that each "offeror must formulate its own manning plan and labor cost proposal." There is no requirement that the offeror furnish evidence of compliance with the fringe benefits provisions of German law. These general provisions do not constitute definitive responsibility criteria. We have held that a wage determination containing a statement of fringe benefits under the Service Contract Act of 1965 does not constitute a definitive responsibility criterion and the clause in this solicitation is less specific than those determinations. James M. Smith, Inc., B-213063, October 12, 1983, 83-2 CPD 459. To the extent that compliance with these provisions is required in performance of the contract, it is a matter of contract administration which will not be reviewed by our Office. Glenn T. Anderson, Inc., B-213640, B-213641, December 14, 1983, 83-2 CPD 689.

Hollfelder also contends that award of the contract to Apex constitutes a violation of the SOFA with the Federal Republic of Germany because the United States is required by Article 47.4 to:

> ". . . respect the principles applying in the Federal Republic regarding public procurement which are reflected in the regulations concerning competition, preferred tenderers and prices applicable to public contracts."

Hollfelder alleges that award to Apex violates this provision because Apex does not intend to pay the fringe benefits required by German law.

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The Army contends that the SOFA sets out provisions considered necessary to govern the actions of the North Atlantic Treaty Organization signatory governments with respect to the stationing of forces in Germany and bestows no rights or privileges on any private party. It is for the signatory state concerned to raise objections to any violations of the SOFA. The Army also argues that Hollfelder has not sustained the evidentiary burden of showing that Apex is in violation of the laws of Germany.

Apex contends, first, that it is in compliance with German labor law; second, that failure of compliance with the labor law is a matter of contract administration not for consideration by our Office; and, third, that Hollfelder has not shown a violation of SOFA.

We agree with Apex that whether Apex is in compliance with German labor law is a matter of contract administration which is not reviewable by our Office. The German labor law comtemplates payment of social benefits in connection with employment in performance of contracts. Whether Apex has paid fringe benefits in the past is not relevant and whether it must pay the benefits or is exempted is only established on performance. There can be no violation of German law until the contract is being performed.

Harry R. Van Cleve

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Acting General Counsel